September 21, 2001

TEXAS TERMINAL OPERATORS
(Headworks - De Minimis)

BY ELECTRONIC MAIL

Mr. Ron Josephson
U.S. Environmental Protection Agency
Ariel Rios Building, Mail Code 5304 W
1200 Pennsylvania Avenue, N. W.
Washington, DC 20460

Re: EPA's Proposed Expansion of Headwork's Exemption: Inclusion of Bulk Storage Terminals in *De Minimis* Exclusion

Dear Mr. Josephson:

This letter is submitted on behalf of the Texas Terminal Operators.[1] Texas Terminal Operators operate for-hire bulk loading, unloading and storage of petroleum and chemicals at multiple locations throughout the State of Texas. Their operations are vital to the continued flow of commerce in bulk commodities throughout the state and the world. These terminals handle petroleum and chemicals, specifically those chemicals[2] that are regulated as listed commercial chemical products in Texas and federal solid waste regulations. Texas has ten such facilities with about 1,100 storage tanks and 32 million barrels of storage capacity.

No manufacturing occurs at for-hire terminal facilities. Therefore, no waste streams identified as K-listed wastes[3] are generated at these facilities. For-hire terminal operations do, however, generate various wastewater streams. These streams result primarily from rainwater that falls in containment areas and intermittently from hydrostatic testing, line flushing, and storage tank/railcar rinsing. Any bulk residues in storage tanks and/or railcars are removed as solid waste prior to the rinsing operation and managed in accordance with Texas and federal solid waste management regulations. Through these various operations, the water that is generated may come into contact with residual commercial chemical products or manufacturing intermediates that are transported to and/or stored at the terminal facilities. Based on the way the Texas Solid Waste Disposal Act implements the federal RCRA regulations in Texas, discarded portions of many commercial chemical products and intermediates are considered to be listed wastes.[4] Due to the mixture rule, mixtures of even small portions of the residual

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[1] This petition is submitted on behalf of Kinder Morgan Terminals, Pakhoed, Intercontinental Terminals Company, Baytank, Inc., Oil Tanking, Petrounited, ST Services, Stolthaven, and Houston Fuel Oil.

[2] *See* 40 C.F.R. Part 261.33(e) and (f).

[3] *See* 40 C.F.R. Part 261.32.

[4] *See* 40 C.F.R. Part 261.33(e) and (f).

commercial chemical products or intermediates and the rinse or rain water produces a listed hazardous waste stream that must be managed as such, without regard to the concentration of the chemical constituents therein, unless delisted. On occasion, these wastewaters might also qualify as hazardous based on characteristic testing.[5] Terminal operators manage these hazardous wastewaters either on-site in wastewater treatment facilities with a subsequent TPDES regulated discharge or by discharge to a publicly owned treatment works ("POTW").

It is our understanding that in response to a variety of issues and concerns, the EPA is currently in the process of developing a rulemaking package that would make certain modifications to the current exemptions to the mixture rule now located under 40 C.F.R. § 261.3(a)(2)(iv)(A)-(E), commonly called the headworks rule. While these exemptions have many parts, we are focused solely on the EPA's planned modification of the *de minimis* losses exemption portion of these rules found at 40 C.F.R. § 261.3(a)(2)(iv)(D). The *de minimis* loss exemption recognizes that wastewaters that have only *de minimis* amounts of discarded commercial chemical product or chemical intermediates should not be defined as hazardous waste. The current rule defines *de minimis* losses as those from:

> normal material handling operations (e.g., spills from the unloading or transfer of materials from bins or other containers, leaks from pipes, valves or other devices used to transfer materials); minor leaks of process equipment, storage tanks or containers; leaks from well maintained pump packings and seals; sample purging; relief device discharges; discharges from safety showers and rinsing and cleaning of personal safety equipment; and rinsate from empty containers or from containers that are rendered empty by that rinsing.

40 C.F.R. § 261.3(a)(2)(iv)(D).

These are precisely the kinds of losses that occur at terminal operations. The exemption present in the federal rule that is adopted by reference in Texas does not apply to terminal operators, however, because our losses do not result from "manufacturing operations in which these materials are used as raw materials or produced in the manufacturing process." *Id.* It is our understanding that the EPA is considering removal of the portion of the rule that limits its applicability to manufacturing operations. We strongly support an expansion of the current exemption that would allow its application to raw material and finished product bulk storage terminals. Terminal operations are a necessary corollary to manufacturing operations. The nature and character of the wastewater resulting from terminal operation losses is exactly the same as those that occur at the manufacturing facility.acture. Consequently, there is no logical basis for the limitation presently contained in the rule and EPA's planned action in this area

[5] *See* 40 C.F.R. Part 261.20 - .24.

makes a lot of sense. The Texas terminal operators support the Agency's efforts in this regard and we would be happy to provide any information required for the rulemaking effort.

We also understand that as part of EPA's planned expansion of the *de minimis* loss exemption, the Agency is considering the addition a new requirement that would limit the amount of discharge subject to the *de minimis* loss to the reportable quantity (RQ) on a total monthly maximum release. We are concerned that such a requirement may place a monitoring and testing burden on the regulated community that is not warranted. The major purpose of the RQ notification requirements in CERCLA is to alert the appropriate governmental officials to "releases" of hazardous substances that may require rapid response to protect public health and welfare and the environment. *See* 50 Fed. Reg. 13456 (April 4, 1985). CERCLA section 101(22) defines "release" as any "...spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the **environment** (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant)....". (emphasis added). Further the term "environment" is defined in section 101(8) as "(A) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Fishery Conservation and Management Act of 1976, and (B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States."

It terms of dealing with *de minimis* quantities of various F, K, P and U listed materials that may be present in the headworks, there has clearly been no "release" to the "environment" as those terms are defined in CERCLA. The wastewaters at a manufacturing facility or a storage terminal are not navigable waters. The only release of these materials to the environment occurs following treatment and discharge, either on-site or after being hard piped to a POTW. Further, those ultimate discharges, presuming they are compliant with applicable permit conditions, qualify as federally permitted releases and are not subject to the release reporting requirements of CERCLA. Therefore, there does not appear to be a logical basis upon which to extrapolate the CERCLA RQ requirements into the *de minimis* loss exemption.

To the exent that the Agency has concerns related to intentional circumvention of the intent of the provision, the language of the exemption is very clear as to the types of losses that are intended to be covered. Large, planned releases are clearly not allowed and any attempts by the regulated community to cover such losses through this rule can be appropriately handled through active enforcement. Second, for this exemption, as with all others in the EPA's rules, the burden is on the person claiming to the exemption to prove their entitlement to do so. These existing safeguards are sufficient, when combined with active enforcement, to ensure that the rule, in its current or expanded form, is protective.

We look forward to the EPA's prompt finalization of its rulemaking package. We will plan to actively participate in the rulemaking once it is proposed in the Federal Register. In

the meantime, should you have any question or need additional information, please do not hesitate to contact me.

Very truly yours,

Mark J. White

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MJW:mjw

cc: Ms. Usha Mehra